

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE AND FEDERAL EMPLOYEES	:	
LOCAL 1029, LABORERS INTERNATIONAL UNION	:	
OF NORTH AMERICA, AFL-CIO,	:	
	:	Unfair Labor Practice Charge
Charging Party,	:	<u>No. 21-06-1275</u>
	:	
v.	:	
	:	PROBABLE CAUSE DETERMINATION
DEPARTMENT OF SAFETY AND HOMELAND SECURITY,	:	
DIVISION OF FORENSIC SCIENCE,	:	
	:	
Respondent.	:	

The State of Delaware (“State”) is a public employer within the meaning of 19 Del. C. §1302(p). The Department of Safety and Homeland Security (“DSHS”) is an agency of the State. The Division of Forensic Science (“DFS”) is a division of DSHS.

The Delaware State and Federal Employees Local 1029 of the Laborers International Union of North America, AFL-CIO, (“LiUNA Local 1029”) is an employee organization within the meaning of 19 Del. C. §1302(i) and is the exclusive bargaining representative of a bargaining unit of DSHS/DFS employees within the meaning of 19 Del. C. §1302(j). LiUNA Local 1209 represents the bargaining unit which includes “All Full-time and Part-time employees of the Department of Safety and Homeland Security, Division of Forensic Science (excluding supervisory and confidential employees as defined in 19 Del. C. Chapter 13).” DOL Case 221.

LiUNA Local 1029 and the State are parties to a fully executed Memorandum of Agreement which has a term of April 30, 2021 through June 30, 2023. *Answer, Exhibit 1.*

On June 25, 2021, LiUNA Local 1029 filed an unfair labor practice charge with the

Delaware Public Employment Relations Board (“PERB”) alleging conduct by the State in violation of 19 Del. C. §1307(a)(1) and (a)(5), which provide:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (1) Interfere with, restrain or coerce any employee because of the exercise of any right guaranteed under this chapter.
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

The Charge alleges the Director of the Division of Forensic Science interfered with, restrained and coerced employees in the exercise of their right to organize, join, form or assist their exclusive bargaining representative by interrogating employees concerning their union activities and refusing to allow reasonable access to the workplace to LiUNA Local 1029 representatives to meet with employees. It also asserts the employer violated the statute by placing additional conditions on LiUNA Local 1029’s visitation to the workplace which are not included in the parties’ negotiated and executed 2021 -2023 Memorandum of Agreement.

On July 7, 2021, the State filed its Answer to the Charge admitting some asserted facts, contesting others, and denying LiUNA Local 1029’s conclusions that it has violated its obligations under the PERA. In the new matter included in its Answer, the State asserts the Charge fails to state a claim for which relief can be granted under either 19 Del. C. §1303, §1307(a)(1), and/or §1307(a)(5); and that the Charge should be deferred to arbitration because the negotiated grievance and arbitration procedure included in the parties’ Memorandum of Agreement encompasses the dispute at issue in this case.

LiUNA Local 1029 filed its response to the New Matter on July 16, 2021, in which it denied the legal defenses and conclusions asserted by the State therein.

This probable cause determination is based on review of the pleadings submitted by the parties.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether a probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

LiUNA Local 1029 alleges that the DFS Director “interrogated its employees concerning their union activities and sympathies” on June 7, 2021 in advance of a visit to the workplace by LiUNA Local 1029 representatives. The State denies this allegation and asserts it should be dismissed because it does not comply with PERB Rule 5.2(c)(3) which

requires that a charge provide

... a clear and detailed statement of facts constituting the alleged unfair labor practice, including the names of individuals involved in the alleged unfair labor practice, the time, place of occurrence and nature of each particular act alleged, and reference to the specific provisions of the statute alleged to be violated.

The Delaware Public Employment Relations Board has interpreted this Rule to require sufficient information be included in pleadings "... to allow a preliminary assessment of the procedural and substantive viability of the charge, i.e., the probability that there is sufficient cause to continue to process the charge."¹ This is consistent with the NLRB standard as set forth in *NLRB v. Piqua Munising Wood Products Co.*²:

The sole function of the complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act, that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of the pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

The NLRB has also held that the names of the employees to whom an alleged (a)(1) violation was directed need not be pleaded, and a respondent is not entitled to disclosure of the names before the hearing.³

The pleadings in this case are sufficient to establish that the charge is based on alleged conversations between the DFS Director and bargaining unit employees on Monday, June 7, 2021. The State acknowledges that LiUNA Local 1029 conducted onsite

¹ *AFSCME Council 81, Local 3911 v. New Castle County*, ULP 09-07-695, VII PERB 4445 (Decision of the Board on Review, 12/29/09)

² 109 F.2d 552, 557 (6th Cir. 1940)

³ *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960) and *Storkline Corp.*, 141 NLRB 899, 902-903 (1963)

visits daily, Monday June 7 through Friday June 11 from 11:00 a.m. to 4:30 p.m. in the workplace auditorium. There is sufficient information in the pleadings to allow a preliminary assessment of the allegation. It will be LiUNA Local 1029's burden to establish that such discussions occurred and were sufficient to support a finding that they interfered with the rights of bargaining unit employees, as alleged. The State will be afforded full opportunity to refute those allegations and to challenge the evidence presented in a hearing.

The parties entered into a Memorandum of Agreement for the period of April 30, 2021 through June 30, 2023 which includes:

Article 21, Visitation

21.1 The State agrees to recognize authorized Union officials including representatives of the Laborers' District Council of Delaware and the International Union, and to permit the said officials to visit the Employer's facilities with prior advance notice and reason for the visit. Ordinary union business shall be conducted in non-secured, administrative areas.

21.2 The Union agrees that said official in each visit to the DFS facilities shall, prior to proceeding with business on the grounds, identify themselves to the Facility Director. *Answer, Exhibit 1.*

There is no dispute that at 4:32 p.m. on Wednesday, June 16, 2021 a LiUNA Local 1029 representative sent an email to the DFS Director to inform him that the union representative intended to be on site to meet with "a number of employees" on the afternoon of June 17, 2021. *Answer, Exhibit 2.*

The DFS Director responded directly by email at 6:54 p.m. notifying the LiUNA Local 1029 representative that the next day was "not doable" because it was short notice and the Director did not know "what time, how long, or how many employees" would be meeting. *Answer, Exhibit 3.* The DFS Director copied numerous individuals on this

email including his Deputy Director, a member of the State Labor Relations/DHR staff, and the LiUNA Local 1029 Business Manager.

The LiUNA Local 1029 representative responded by email at 8:25 p.m. that he would not arrive before 2:00 p.m. and assured the Director that he did not intend to meet with employees unless it was during their break periods. *Answer, Exhibit 4.*

The DFS Director responded, again by email at 8:58 p.m. that he would reserve the auditorium for the union to use between 11:00 a.m. and 2:00 p.m. on Monday, June 21, 2021. *Answer, Exhibit 5.*

There is also no material dispute as to the email exchange of June 16 or that when the LiUNA Local 1029 representative arrived at the workplace the next afternoon that he was denied access and informed that the auditorium was reserved for his use on Monday, June 21 between 11:00 a.m. and 2:00 p.m. *Answer ¶10.*

LiUNA Local 1029 asserts that by violating Article 21 of the Memorandum of Agreement, the State violated its duty to bargain in good faith by unilaterally modifying the negotiated provisions of Article 21. To the extent these parties chose to negotiate the terms requiring notification before the union accessed the workplace, those terms are subject to enforcement through the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure.⁴

An alleged unilateral change to a contractual term does not violate an employer's obligation to bargain in good faith unless it involves a mandatory subject of bargaining.⁵

⁴ *Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Board of Education*, ULP 85-06-005, I PERB 131, 142-146 (Decision, 2/5/86)

⁵ *DSTA v. DSP*, ULP 20-09-1248, IX PERB 8321, 8328 (Probable Cause Determination and Order of Dismissal, 1/8/21) *affirmed by PERB*, IX PERB 8351 (3/4/21)

Whether the terms of access to the workplace for an exclusive bargaining representative to meet with employees is a mandatory subject of bargaining under the PERA is a question of first impression. Following creation of the factual record in this case, the parties will be provided the opportunity to submit legal argument on this point.

Finally, regardless of whether the terms of Article 21 of the MOA were violated, the PERA establishes specific rights which accrue to public employees in Delaware:

§ 1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

Interference with these rights constitutes a violation of 19 Del. C. §1307(a)(1) and can be independent of an alleged violation of the duty to bargain in good faith. The pleadings are sufficient to support the conclusion that the employer may have interfered with the bargaining unit employees statutory rights to engage in concerted activities or mutual aid or protection and/or to join or assist their exclusive bargaining representative and to be represented by LiUNA Local 1029.

The pleadings raise both factual and legal questions. It will ultimately be LiUNA Local 1029's burden to establish by a preponderance of the evidence that the State violated the PERA, as alleged.

DETERMINATION

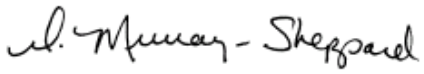
Considered in a light most favorable to LiUNA Local 1029, the pleadings are sufficient to establish that the State may have violated 19 Del. C. §1307 (a)(1) and/or (a)(5), as alleged.

WHEREFORE, a hearing will be scheduled for the purpose of developing a full and complete factual record upon which a decision can be rendered concerning:

WHETHER THE STATE INTERFERED WITH THE PROTECTED RIGHTS OF
EMPLOYEES AND/OR FAILED TO BARGAIN IN GOOD FAITH BY
INTERROGATING EMPLOYEES CONCERNING THEIR UNION ACTIVITIES AND
SYMPATHIES AND/OR REFUSING OR LIMITING ACCESS TO BARGAINING
UNIT EMPLOYEES BY THE EXCLUSIVE BARGAINING REPRESENTATIVE IN
THE WORKPLACE, IN VIOLATION OF 19 DEL. C. §1307(A)(1) AND/OR
(A)(5).

Having found probable cause based on the pleadings, the State's asserted defense that the Charge fails to state a claim on which relief may be granted under the PERA is denied.

DATE: December 14, 2021



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.